Colbi's, Inc. *and* Massachusetts Laborers' Benefit Funds. Case 1–CA–28046

May 29, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

Upon a charge filed on February 22, 1991, by the Massachusetts Laborers' Benefit Funds, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing and amendment to complaint on April 11, 1991, and September 9, 1991, respectively, against Colbi's, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) by failing and refusing to bargain collectively and in good faith with Laborers Local 223 a/w Massachusetts Laborers' District Council a/w Laborers' International Union of North America, AFL–CIO, respectively, Laborers Local 223 and the District Council, within the meaning of the National Labor Relations Act. Although properly served copies of the charge, complaint, and amendment to complaint, the Respondent has failed to file an answer.[1]

On May 6, 1992, the General Counsel filed a Motion for Summary Judgment. On May 8, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letters dated August 29 and October 2, 1991, notified the Respondent that unless an answer was received by close of business on September 5 and October 9, 1991, respectively, a Motion for Summary Judgment would be filed. To date, no answer has been filed by the Respondent.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Massachusetts corporation with an office and place of business in Boston, Massachusetts, has been engaged as a contractor in the construction industry. The Respondent, in the course and conduct of its business operations, annually provided construction services valued in excess of $50,000 for enterprises located outside the Commonwealth of Massachusetts and during the same period, provided construction services valued in excess of $50,000 for enterprises within the Commonwealth of Massachusetts which enterprises are directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Laborers Local 223 and the District Council are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Associated General Contractors of Massachusetts, Inc. (the AGC), and the Building Trades Employers' Association of Boston and Eastern Massachusetts, Inc. (jointly called the Associations) have been organizations composed of employers engaged in the construction industry, and which exist for the purpose, inter alia, of representing their employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the District Council.

On or about June 1, 1988, the Associations and the District Council, acting for and on behalf of the Locals, entered into a collective-bargaining agreement, which is effective by its terms for the period June 1, 1988, through May 31, 1991 (the 1988–1991 Agreement).

On or about August 29, 1989, the Respondent entered into an "Acceptance of Agreement and Declaration of Trust" with Laborers Local 223, that binds the Respondent to the terms and conditions of employment of the 1988–1991 Agreement.

The unit of Respondent's employees covered by the Agreement is as follows:

[1] The Respondent accepted service of the complaint and notice of hearing but thereafter did not accept service of other documents including the amendment to the complaint and correspondence from counsel for the General Counsel. Respondent's refusal to accept or claim certified mail cannot serve to defeat the purposes the Act. See *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

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The unit of Respondent's employees covered by the Agreement is as follows:

[1] The Respondent accepted service of the complaint and notice of hearing but thereafter did not accept service of other documents including the amendment to the complaint and correspondence from counsel for the General Counsel. Respondent's refusal to accept or claim certified mail cannot serve to defeat the purposes the Act. See *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986).

> All laborers employed by the Respondent working within the territorial jurisdiction of the Union, but excluding guards and supervisors as defined in the Act.

This constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all times material, the District Council and the Local, by virtue of Section 9(a) of the Act have been and are the exclusive bargaining representative for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the bargaining unit.

Since about October 20, 1990, the Respondent has failed and refused to pay the fringe benefit amounts under articles XI, XII, XIII, XIV, and XV of the 1988–1991 Agreement.

These subjects relate to wages, hours of employment, and other terms and conditions of employment, and are mandatory subjects for the purposes of collective bargaining.

We find that by engaging in the above-described conduct, the Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (5) and 8(d) of the Act.

CONCLUSION OF LAW

By its failure on and after October 20, 1990, to continue in full force and effect all the terms and conditions of the collective-bargaining agreement by failing to pay the fringe benefit amounts to the Massachusetts Laborers' Benefit Funds, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), Section 8(d), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make all contractually required payments it failed to make since October 20, 1991.[2]

The Respondent shall also make its employees whole for any losses attributable to its failure to make the contractually required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Colbi's, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Laborers Local 223, and with Massachusetts Laborers' District Council a/w Laborers' International Union of North America, AFL–CIO, as the exclusive representative of its employees in the bargaining unit, by failing to make contractually required contributions to the Massachusetts Laborers' Benefit Funds.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Continue in full force and effect all the terms and conditions of the collective-bargaining agreements with the exclusive representative of the employees in the following appropriate unit:

> All laborers employed by the Respondent working with the territorial jurisdiction of the Union, but excluding guards and supervisors as defined in the Act.

(b) Make all contributions required pursuant to the collective-bargaining agreements including contractually required payments to the Massachusetts Laborers' Benefit Funds.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required payments.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in Boston, Massachusetts, copies of the attached notice marked "Appendix."[3]

[2] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Laborers Local 223, and with Massachusetts Laborers' District Council a/w Laborers' International Union of North America, AFL–CIO, as the exclusive representative of the employees in the following bargaining unit:

> All laborers employed by the Respondent working with the territorial jurisdiction of the Union, but excluding guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to continue in full force and effect all the terms of our agreement by failing to make contractually required payments to the Massachusetts Laborers' Benefit Funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all the terms and conditions of our collective-bargaining agreement with the Union.

WE WILL make all contractually required contributions to the Massachusetts Laborers' Benefit Funds.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to make contractually required contributions to the Massachusetts Laborers' Benefit Funds.

COLBI'S, INC.